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DATE ISSUED: SEPTEMBER 1, 2000

CASE NO.: 1999-LHC-2673

OWCP NO.: 07-144477

IN THE MATTER OF

PHILIP PARENT,
Claimant

v.

AVONDALE INDUSTRIES, INC.,
Employer

APPEARANCES:

Arthur J. Brewster Esq.
On behalf of the Claimant

Wayne G. Zeringue, Jr., Esq.
Christopher S. Mann Esq.
On behalf of the Employer and Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., brought by Philip Parent (Claimant), against Avondale Industries, Inc., (Employer). The

issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before me on April 26, 2000, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post hearing briefs in support of their positions. Claimant testified and introduced twelve exhibits, which were admitted into evidence, (CX-1 to CX-12), including Dr. James C. Butler's testimony and records; Tulane University Medical Hospital and Clinic (Tulane) medical records; Ochsner Clinic (Ochsner) medical records; Slidell Memorial Hospital medical records; Avondale First Aid medical records; Jefferson Counseling Services, Inc., records; LA Works Occupational Performance and Assessment Center (LA Works) records; Seyler/Favalora Ltd. records on Claimant; correspondence from Debbie Hebert to Claimant, dated August 25, 1998, regarding return to work; LS-206 and 207's filed by Avondale; photograph's taken at vessel inspection; and Defendant's Answers to Interrogatories and Request for Production of Documents.

Employer introduced sixteen exhibits, which were admitted into evidence, (EX-1 to EX-16), including Claimant's Personnel File at Avondale; Avondale's First Aid File on Claimant; Dr. Lawrence Russo's records on Claimant; Dr. James Butler's deposition and records on Claimant; Seyler/Favalora Ltd. records on Claimant; Nancy T. Favalora's Vocational Rehabilitation Report dated April 24, 2000; records and report of Functional Capacity Evaluation completed on Claimant at LA Works; Jefferson Counseling Services/Patty Knight's records and reports on Claimant; records and reports of Slidell Memorial Hospital, records and reports of Ochsner; Memorandum from Steve McCann dated August 4, 1999; job description of First Class Hydraulic Operator/Mechanic dated December 14, 1998 and submitted by Nancy T. Favalora and Favalora's deposition; Claimant's wage records at Avondale; and photograph's taken at vessel inspection. In addition, Employer's counsel called Nancy T. Favalora as a witness.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witnesses' demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The date of Claimant's injury/accident was June 13, 1997.

2. Claimant suffered an injury in the course and scope of his employment.

3. An Employer /Employee relationship existed at the time of the accident.

4. Employer was advised of the injury on June 13, 1997.

5. Employer filed Notices of Controversion on June 20, 1997, November 11, 1998, December 8 and 18, 1998, and June 16, 1999.

6. An informal conference was held in this matter on December 14, 1998.

7. Claimant's Average Weekly Wage (AWW) at the time of his injury was $521.20.

8. Employer paid Claimant temporary total disability benefits (TTD) from June 14, 1997 to August 24, 1997, and from February 3, 1998 to August 30, 1998, at the weekly compensation rate of $347.47 for 40.14 weeks, totaling $13,948.00.

9. Medical benefits were paid in the amount of $8,192.03.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and Extent of Claimant's Disability.

2. Entitlement to Compensation.

3. Suitable Alternative Employment.

4. Section 8(f) entitlement.

III. STATEMENT OF THE CASE

A. Chronology:

Philip Parent (Claimant) is a sixty year old male, with a high school education. He began working for Avondale Industries (Employer) in 1991, and was working for Employer as a hydraulic operator at the time of his

injury[1]. (Tr. 93-95). This job consisted of installing, testing, and troubleshooting to repair anything that involved fluids, such as engines, cranes, steering mechanisms, and propulsion mechanisms. Claimant used the steering ramp or the forward gangway to board the vessel, and he could access the various decks of the ship by stairwells or ramps. (Tr. 102-03). Claimant also injured his hip in a lifeboat drill while working for Employer, prior to his June 13,1997 injury/accident currently in dispute. Claimant was released to return to work after that incident, and had no problems until June 13, 1997. (Tr. 96-97).

Following his June 13, 1997 workplace injury, Claimant's work history with Employer was as follows: (1) Claimant was off work from June 14, 1997 to August 24, 1997, during which time he was paid TTD; (2) Claimant worked from August 25, 1997 to February 2, 1998 in a modified sedentary to light duty position as a first class hydraulic operator; (3) Claimant was off work again from February 3, 1998 to August 30, 1998, during which time he was paid TTD; (4) Claimant worked from August 31, 1998 to October 6, 1998 in basically the same modified sedentary to light duty position as a first class hydraulic operator; (5) Claimant was off work again from October 7, 1998 to December 27, 1998, during which time no compensation was paid; (6) Claimant worked from December 28, 1998 to June 8, 1999 in basically the same modified sedentary to light duty position as a first class hydraulic operator, and has not worked since June 9, 1999. The subject matter of the instant suit involves the failure to pay compensation from October 7, 1998 to December 27, 1998, and from June 9, 1999 and continuing.

On June 13, 1997 Claimant was working for Employer, as a first class hydraulic operator on the "Bob Hope" class of ships, when he slipped and fell from a pipe that he was standing on. (Tr. 103-04; CX-2, pp. 4-6). Claimant noted the onset of symptoms in his lower back and buttock while pulling some pipe wrenches at work about an hour later that same day. At that time Claimant reported the injury to his foreman, who noted the workplace accident in Claimant's first aid file at work. (CX-5, pp. 5-6). However, a first report of the accident was not completed until June 16, 1997. After reporting the accident to his foreman and on the same day as his accident, Claimant sought medical attention, and Employer sent him to West Jefferson Hospital via ambulance, where he saw the company doctor, who prescribed Darvocet, and then Dr. Griffee at an Ochsner Clinic on June 17, 1997, who prescribed Vicodin for his pain. (CX-3, p.1).

Claimant next exercised his right, under the Act, to choose a physician, and chose to see Dr. Butler for orthopedic treatment. Dr. Butler first treated Claimant on June 18, 1997 with complaints of back pain that radiated

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1 Prior to working for Employer, Claimant worked as a real estate appraiser from 1988-1991. He owned and operated a truck manufacturing and repair business, One Stop, from 1978-88. In the course of operating One Stop, Claimant sustained an injury which required a lumbar laminectomy. He subsequently sold his business, as he could not physically perform the job after his injury. From 1955 to 1978, Claimant was employed by Delta Petroleum, where he worked as a deckhand, mechanic, and ship's captain. Claimant's previous employment was light to heavy in terms of physical demands and semi-skilled to skilled in nature. (EX-1, p. 18; CX-6, p. 42).

to the left buttock. Claimant described a burning sensation in his buttock and left thigh, and a numbness in the medial aspect of his right buttock, which worsened with activity,. Physical examination showed that Claimant could stand erect but was unable to hyperextend his back because of complaints of low back pain. All movements were limited by subjectively worsening low back pain. He also had a positive straight leg raising test on the right side, suggesting some irritation of the lumbar nerves on that affected side. (CX-2, pp. 5-7; CX-4, pp. 26-27). X-rays were performed at that time, indicating some postsurgical changes at the L4-5 level consistent with his previous surgery. Dr. Butler opined that Claimant had some component radiculopathy and sustained a lumbar strain. Dr. Butler recommended physical therapy or having lumbar MRI completed.

Claimant next saw Dr. Butler on June 25, 1997, with complaints of back and right leg pain with numbness. (EX-4, p. 25). The MRI was subsequently approved and completed on July 2, 1997 at Slidell Memorial, which Dr. Butler reviewed on July 8, 1997, and found indicated mild to moderate stenosis or spinal stenosis at the L3-4 level. (CX-2, pp. 8-9; CX-4; EX-4, p.24). Claimant presented with similar pain complaints upon his July 8, 1997 examination by Dr. Butler, who recommended physical therapy, three times a week for two weeks, and released Claimant to sedentary work. Claimant received physical therapy at Slidell Memorial from July 17, 1997 to August 14, 1997, when he was discharged from therapy with all goals completed. Claimant next saw Dr. Butler on July 29, 1997, and reported to Dr. Butler that the physical therapist recommended continuing therapy, which Dr. Butler ordered, as well as suggesting that Claimant undergo a functional capacity evaluation (FCE). (CX-2, pp. 9-10; EX-4, p. 23). Dr. Butler released Claimant to sedentary to light duty work, requesting that Claimant return to see him in one month.

Claimant next saw Dr. Lawrence J. Russo, an orthopedist, on August 7, 1997, who examined Claimant on that one occasion due to lumbar pain, radiating into Claimant's right thigh, hip, and calf areas. (EX-3). Upon that visit to Dr. Russo, Claimant reported decreased back pain, which was made worse by certain activities, and that his leg pain had resolved, as well he was sleeping better, and exercising. Dr. Russo examined Claimant finding him to have a mild restriction in the range of motion in the lumbar spine. Claimant had no muscle spasm and no tenderness to the muscles. He had a normal neurological examination of the lower extremities. Dr. Russo diagnosed Claimant with a lumbar sprain superimposed upon a previous lumbar laminectomy, and recommended that Claimant follow through with Dr. Butler's recommendation for another couple of weeks of physical therapy, upon completion of which Dr. Russo opined that Claimant would have reached MMI.

Claimant returned to Dr. Butler's office on August 19, 1997. His back and leg symptoms had completely resolved. Dr. Butler released him to full duty work effective August 25, 1997, with continued home lumbar exercises and return visits as needed. (EX-4, p. 22). Although Claimant was released to full duty and returned to his prior position as a first class hydraulic operator for Employer, Claimant's supervisor instructed him not to lift anything heavy. (Tr. pp. 106-07).

Claimant returned to see Dr. Butler on February 3, 1998, with complaints of reoccurring symptoms, which had reportedly never completely resolved. (EX-4, p. 21; CX-2 pp. 11-12, 55). Claimant denied further trauma but reported that he had been doing a lot of walking, climbing, lifting, and carrying on the job. Examination revealed

subjective tenderness in the lower back at the L4-5 level. Paraspinous muscles were tender in that area but no muscle spasm was detectable. Claimant's range of motion was limited and all movements caused him to have subjectively worsening low back pain. Dr. Butler advised Claimant not to work at that time and undergo exercises with prescription medication for pain relief. Claimant reported to Dr. Butler that he preferred home exercises and would carry such orders out.

Claimant continued to receive conservative treatment from Dr. Butler and eventually underwent a functional capacity evaluation (FCE) on June 29 and 30, 1998 in order to determine his physical capabilities. (EX-6). The FCE established that Claimant was capable of returning to work under certain lifting and mobility restrictions. (EX-6, pp. 2-3). Dr. Butler, Claimant's treating physician, agreed with the limitations set forth in the FCE. (EX-4, p.13). Based on these results, Employer identified a position in Claimant's former department that fell within Claimant's restrictions as identified in the FCE and approved by Dr. Butler. (CX-9). Claimant returned to work at Employer in the modified position on August 31, 1998. (EX-2, p. 2).

Claimant knew what his restrictions were and knew that he was not requested to work outside of them. Claimant's supervisor, Steve McCann (McCann), specifically instructed Claimant to work only within his restrictions. (Tr. pp. 316-19, 374-75). Despite the restrictions placed on Claimant, and contrary to McCann's direct instructions, Claimant voluntarily worked outside of his restrictions, including voluntarily working numerous overtime hours. (Tr. pp. 257-58). Claimant's decision to work outside his restrictions caused increased complaints of back pain and led Dr. Butler to take Claimant off work on October 7, 1998. (EX-4, pp. 8-11).

At Employer's request, Ms. Nancy Favalora (Favalora), a Vocational Rehabilitation Counselor, prepared a written job description of Claimant's modified position for Employer. (EX-11). This job description verified that Claimant's modified position fell within his restrictions as identified by the FCE. (EX- 16, pp. 19-20). Dr. Butler reviewed the job description and confirmed by his signature on December 28, 1998 that Claimant was capable of performing the modified job. (EX- 15). Claimant returned to work on December 28, 1998.

After Claimant returned to his modified position for Employer, he continued to voluntarily work outside of the limited duties that were placed on him by his supervisor, McCann, and beyond the restrictions identified in the FCE, as approved by Dr. Butler. Claimant worked in the modified job for six months through June 8, 1999. Claimant has not worked since June 8, 1999 and has made no independent effort to find employment within the restrictions identified by Dr. Butler. (Tr. p. 230).

B. Claimant's Testimony

Claimant recounted his work history, medical history, the facts of his workplace injury, and medical treatment received for said injury. Claimant testified that immediately after his June 13, 1997 workplace accident, nothing bothered him for about an hour, when everything began to bother him. (Tr. 104). Claimant testified that he could feel a doughnut in his back, as well his back and legs were bothering him.

Claimant testified that when he first returned to work from August 25, 1997 through February 2, 1998, no modifications were made to his position in the hydraulics department by Employer, but for the fact that he was instructed not to lift anything heavy. (Tr. 106-09). Claimant testified that he had problems at that time performing his duties as an operator. And that the discomfort was tolerable, but kept getting worse, until Dr. Butler again took Claimant off of work in February 1998. Claimant testified that when he returned to work from August 31, 1998 through October 7, 1998, again no modifications were made to his position in the hydraulics department by Employer, but for the fact that he was again instructed by the first aid department not to lift anything heavy[2]. (Tr. 116).

Claimant underwent an FCE on June 30, 1998, the results of which Claimant testified were not available to him upon meeting with Dr. Butler just prior to returning to work in August of 1998. (Tr. 120). Claimant spoke with Hebert and she informed him that Employer had a job within his physical limitations, to which Claimant testified that he was "tickled to death" about returning to work within his classification. (Tr. 120-24). Upon returning to work, Claimant reported to first aid and first aid called McCann, Claimant's supervisor, who escorted Claimant to the yard and Claimant began to work. Claimant testified that first aid did not tell him not to lift anything heavy[3]. However, by the time Claimant returned to Employer, he was aware that he was not to lift anything heavy because he had seen the FCE. (Tr. 125-26). Claimant was given a yard pass, which allowed him to park closer to the worksite. (Tr. 130-31).

At first, Claimant worked on the ground, then did some shipboard work, and as things got busier, he worked

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2 Claimant frequently contradicted his testimony, as I will point out throughout this opinion. Inconsistencies were present throughout Claimant's testimony, as indicated by the record. Specifically, Claimant testified that he did not see his FCE results prior to returning to work in August 1998, and that Dr. Butler did not review with him restrictions set forth by the FCE, but simply told Claimant not to do anything upon returning to work. (Tr. 120-23). Claimant then contradicted himself when he testified that prior to his August 1998 return to work he and Dr. Butler never discussed the FCE, but Dr. Butler explained the FCE to him. (Tr. 202-04). Moreover, Claimant testified that the FCE was never given to him. Nonetheless, Claimant admitted to having the FCE. Claimant also admitted that he knew what his physical limitations and restrictions were before he returned to work for Employer, as well Claimant testified that he returned to work on December 28, 1998 in the modified position as outlined by Favalora's December 14, 1998 report. (Tr. 155-56). However this modified position existed according to Favalora as of August 1998. Claimant further testified that he was not required to work overtime, but chose to do so, just as Claimant chose to perform numerous tasks, which exceeded his restrictions as set forth by the FCE and Dr. Butler, versus waiting for a second or third class mechanic to assist. (Tr. 165, 218-19, 238). I discredit Claimant's testimony that (1) he did not know or see the contents of his FCE before he returned to work in August, 1998 and (2) Employer did not offer him a modified job in conformity with the FCE in August 1998.

3. I note this testimony to be in conflict with the testimony Claimant previously provided on page 116 of the transcript, that first aid did instruct him not to lift anything heavy.

more on the ships. (Tr. 131). Claimant testified that he was doing physical work at this time, and not supervising anyone. (Tr. 132). Claimant testified that on one occasion during this time frame he, along with two co-workers had to go underneath the stern ramp to repair equipment, and that all three employees were needed for the task, including Claimant, as he was not instructing his two co-workers, but was working with them. (Tr. 134-35, 139-42). Furthermore, one had to kneel or crouch to work in this area, and could not stand erect. Claimant testified that the only time he would actually instruct second class operators, was if he was running a test.

Claimant testified that he was working on the ramp, cranes, and sometimes used tools to tighten fittings. (Tr. 135, 158, 165). Claimant indicated that he had to tighten fittings himself, and could not wait for a helper to do so, or he would be risking his job. Claimant also had to climb vertical ladders to get into cranes, as these were the only means of accessing cranes, upon which Claimant had to perform hydraulics tests. (Tr. 136, 149). Claimant testified that this was the most demanding test aboard the "Bob Hope" ships, and that it was too loud for him to perform said tests via radio. (Tr.137). Due to regulations, this work had to be done by a first class operator or a very experienced second class operator, requiring Claimant to be inside the crane to record data. (Tr. 136-37, 147-50).

Claimant testified that his condition progressively worsened, after returning to modified duty for Employer in late August of 1998. He continued working until October 7, 1998 and remained off of work until December 27, 1998, during which period Claimant was under Dr. Butler's care, but did not receive any compensation during said period.

Claimant returned to work on December 28, 1998, for Employer, in the modified position as outlined by Favalora's report of December 14, 1998. (Tr. 155). Upon returning to work, Claimant again initially worked on the ground, looked for parts and equipment and did not work on the boat, during which time he had no problems carrying out his duties. (Tr. 156).

When Claimant initially started back aboard the boats, he did not have any problems. (Tr. 156). Claimant was testing equipment aboard the ships, troubleshooting, doing some repair work, and recording data during testing, as well, Claimant was not carrying any tools, upon his return to work from December 28, 1998 until June of 1999. (Tr. 157-58). However, Claimant testified that he was using tools on the job to tighten fittings, because nobody was there at the time to assist, nonetheless, admitting that he chose to use the tools himself. (Tr. 165, 218-19).

Claimant testified that he would climb onto the ship via a gangway, equal to less than one flight of stairs, which had handrails and was nice and safe, in order to gain access to the ship. (Tr. 158-62; CX-11, photo B). In fact, Claimant testified that climbing ramps and stairs repeatedly was a main source of his pain. (Tr. 103). However, Claimant himself admitted that he was not required to climb in excess of that amount established in his FCE. (EX-6, p. 3; Tr. 215). Pursuant to his FCE, Claimant was limited to climbing between one and thirty-three percent of his day, which corresponds to a maximum of 2.64 hours per day, in an eight hour work day. Claimant could use stairs, hoistable ramps, and/or fixed ramps to get from deck to deck. (CX-11, photos C-F). Claimant had trouble climbing the ramps, because he felt the need to lean forward when climbing said ramps. Moreover, the ramps were steep and slippery. (Tr. 163). Claimant testified that he had to bend and stoop, upon his last return to work for Employer.

(Tr. 163-64).

Claimant testified that he never had helpers, yet admitted that approximately 75% of the time, he worked with other first, second and third class operators, who were not helpers, but could perform certain tasks for Claimant upon request. (Tr. 166-70). Conversely, Claimant prior testified that helpers did work with him. (Tr. 101). Still, Claimant testified that approximately half the time the other less skilled workers were not qualified to do certain activities, and he had to do it himself, the other 50% of the time he had to be physically present but could provide instructions. (Tr. 171). Claimant then testified that for safety reasons, he would either have to do the work himself or physically be there and instruct lesser skilled personnel, such as second and third class mechanics and helpers. (Tr. 174). Finally, Claimant testified that on one particular Monday he was assigned helpers but that was the only time. (Tr. 175).

By June of 1999, Claimant testified that he could not continue working, as his back was hurting. By that time, he was having trouble lying down and driving, and was taking pain medication. (Tr. 176-77). Claimant admitted that the only complaint he made about the problems he was having, working outside of his duties, was on one occasion, just before leaving. Claimant called his foreman on the radio and the telephone stating that they needed additional help on the prior mentioned crane test they were performing, to which McCann instructed Claimant to do the best he could. Claimant never reported to McCann, or anyone with Employer, that he was assigned work outside of his restrictions. (Tr. 206-14).

Claimant testified that Employer did not require him to work overtime after returning to work in a modified position, but he chose to work overtime. (Tr. p. 238). Furthermore, Claimant understood the restrictions placed on him pursuant to his FCE, as approved by Dr. Butler, yet he chose to work beyond those restrictions. (Tr. 203-04).

On June 8, 1999, Claimant returned to see Dr. Butler about his condition, informing him that he was running up and down stairs again. Dr. Butler responded by providing Claimant with an unfit for duty slip, which Claimant did not provide to Employer, but testified that Dr. Butler provided such to Employer[4]. (Tr. 178). Claimant testified that he has remained under Dr. Butler's care since that time, who has not changed Claimant's restrictions in any regard.

Claimant testified that he wants to work and felt he could have worked for Employer if he did not have to work aboard a ship. (Tr. 189). In fact, Claimant testified that on one occasion subsequent to his leaving in June 1999, he discussed returning to work for Employer with John Whittington (Whittington), a pipe foreman. Claimant alleged that he saw Whittington at K-Mart one Sunday about eight weeks prior to the hearing, when Whittington

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4. I note that Dr. Butler did examine Claimant on June 8, 1999, who presented with increasing back and leg pain, reportedly due to excessive climbing at work. (CX-2, pp. 26-33). However, when Claimant mentioned upon that visit that he was considering proceeding with surgery, Dr. Butler advised Claimant to continue working in a sedentary capacity and return for follow-up in six weeks.

asked Claimant if he would be interested in coordinating a new project. Claimant testified that he expressed an interest in the position. In fact, Whittington called Claimant back and informed him that he would have to go through Hebert with workers' compensation for the coordinator position, to which Claimant responded he could not contact Hebert because she requested that Claimant not call her and instead go through her lawyer. (Tr. 183-85).

Claimant further testified that a couple of days prior to the hearing before me, his counsel provided him with job leads compiled by Favalora. Claimant applied with several employers, who he was waiting to hear responses from at he time of his hearing. (Tr. 186-88).

Since his workplace accident, Claimant sold his boat and no longer takes weekend trips with his wife by car. (Tr. 192-93). Claimant testified that he has not worked for a salary for anybody since June 1999, and has applied for Social Security Disability, which he is still waiting to hear about. Claimant's wife works, which is his sole source of income.

C. Testimony of Patricia A. Knight, Rehabilitation Expert, with Jefferson Counseling Services

Claimant met with vocational rehabilitation specialist, Patricia A. Knight (Knight), with Jefferson Counseling Services, upon referral by the Department of Labor, on May 21, 1998, to determine job possibilities for Claimant, Knight also testified at the hearing before me on the instant matter . (EX-7, pp. 34-42). Knight gathered personal background information on Claimant, as well as reviewing Claimant's work history, First Report of Injury dated June 17, 1997, and medical treatment history related to his workplace injury, as provided by Dr. Butler, Slidell Memorial Hospital Outpatient Rehabilitation Services, and a Medical Imaging Report dated July 2, 1997. Knight discussed Claimant's employment interests and goals with Claimant during their initial visit, determining that Claimant would like to return to work, either for Employer or elsewhere. Knight met with Claimant again on June 1, 1998, and they scheduled an appointment with Dr. Roberta Bell (Bell) on July 1, 1998, to assess Claimant's intelligence and literacy.

Subsequent to his June 1, 1998 meeting with Knight, Claimant completed a Career Interest Inventory, per Knight's request, which was received and scored on June 16, 1998. Claimant demonstrated a high interest for the Realistic Theme of Work, and average interests for the Investigative, Artistic and Conventional Themes of Work. On the Basic Interest Area Scales, elevations were seen for manual/skilled trades, carpentry, and electronics. On the Occupational Scales, Claimant's scores were similar to those of individuals working as orthotists/prosthetists, aircraft mechanics, pipefitters/plumbers, telephone repair technicians, and auto mechanics. On the Administrative Indices, Claimant demonstrated a Fine Arts/Mechanical Scale reflecting preference for many mechanical types of activities and occupations, and a general indifference for many creative and aesthetic activities. His Occupational Extroversion/Introversion Scale suggested he would prefer working with things rather than people. His Educational Orientation Scale was in the mid-range, a score generally obtained by adults who have pursued vocational/technical, business, or some community college course work.

On July 23, 1998 Knight received and reviewed Claimant's FCE report, which she interpreted to show that Claimant was capable of working in the sedentary level. (EX-7, p. 32). He was able to lift six pounds frequently, eighteen pounds occasionally, with overhead lifting restricted to twelve pounds occasionally and six pounds frequently. He was able to carry ten pounds occasionally and five pounds frequently. Claimant demonstrated the ability to sit, stand, walk and reach frequently throughout the work time. He was able to squat, kneel, and stair climb occasionally. He was not able to tolerate repetitive bending and crawling.

Knight met with Claimant on August 24, 1998 to review the results of Dr. Bell's assessment, as well as the interest inventory results. Testing by Dr. Bell found Claimant to have a full scale IQ of 110, placing him in the high average range. His grade equivalency in passage comprehension was at 16.9, indicating that Claimant is very capable of performing jobs requiring reading and writing tasks. FCE results and the Career Interest Inventory results, which had been completed by Claimant subsequent to his June 1, 1998 meeting with Knight, were also reviewed with Claimant during his August 24, 1998 meeting with Knight. Knight subsequently opined in her August 31, 1998 report, that Claimant's physical capabilities were within the sedentary to light category of work. (EX-7, pp. 26-30).

On September 1, 1998, Claimant reported to Knight, as documented in her September 30, 1998 report, that he had gone back to work for Employer, and although he was not doing any heavy lifting, Claimant was doing just about everything he was doing before. (EX-7, pp. 23-25). Claimant reported that he had most recently worked an eleven hour shift, during which he did frequent climbing. Claimant felt as though he was not carrying his own weight at work, since he was unable to physically do much of what was required in his normal work situation.

On October 1, 1998, Claimant reported to Knight that he had been working as many as one hundred hours in one week. He also stated that he was climbing up to ten flights of stairs, crawling occasionally, and bending frequently. He reported that he has to carry his hip tools, which weigh about twenty-five pounds. Claimant also indicated that although he was told not to lift anything heavy, he was required to lift pipes, pumps, and barrels of oil. Still, Claimant was afraid to complain about the physical requirements for fear of termination. Claimant indicated that he was tolerating driving a little better, and that he had no trouble driving to work in the middle of the night when there is no traffic, as he could make it to work without having to stop to get out of his vehicle and walk around. (EX-7, pp. 19-22).

Claimant met with Knight on October 21, 1998 to complete an Individual Rehabilitation Plan, and Job Search Plan and Agreement, which included a variety of agreed upon jobs, including real estate appraiser, security officer, and dispatcher. Knight also provided Claimant with state and federal application forms to be completed prior to their next meeting, scheduled for November 3, 1998. However, neither party submitted evidence documenting that the meeting scheduled for November 3, 1998 was actually held.

Claimant next met with Knight on November 9, 1998 to review the results of real estate appraiser research and contacts made with real estate appraising companies and a real estate school in an effort to gather information about the real estate appraiser job. Claimant was again provided with state and federal application forms to be completed by Claimant with information about his past experience, so that Jefferson Counseling Services could assist

Claimant in completing a resume. Claimant indicated that he would be interested in the possibility of securing employment with the government to perform appraisals. (EX-7, pp. 13-18).

On December 4, 1998, Knight wrote Claimant, providing him with information regarding the requirements for submission of experience and education for the Louisiana Real Estate Appraisers State Board of Certification, requesting that Claimant contact her as soon as possible to discuss his experience and education and how it could have qualified Claimant to take the examination. (EX-7, pp. 11-12).

Claimant next met with Knight on November 30, 1998, at which time Claimant indicated that he had applied for several positions throughout the community, but for which he had no Employer contact records. Claimant also indicated an interest in a harbor master position or possibly acquiring his real estate appraisal certification. Subsequent to that meeting, Knight received materials from the Louisiana Real Estate Appraisers State Board of Certification, which materials she forwarded to Claimant and requested that Claimant contact Jefferson Counseling Services. On December 14, 1998 Knight contacted Claimant and requested that he bring her the records of his job search with the forms that were provided to him, which Claimant alleged to have been keeping. Claimant also alleged to have mailed Knight his completed state and federal application forms, yet she had not received them. Knight again requested that Claimant provide information about his past experience, so that Jefferson Counseling Services could assist Claimant in completing a resume. (EX-7, pp. 6-10).

Knight scheduled an appointment to meet with Claimant on December 21, 1998, which he called to cancel on December 21, 1998 due to transportation problems. Claimant reported to Knight that Favalora had completed a job description of his modified position for Employer, which indicated that he could start work on a part-time basis and slowly build up to full-time, he would be provided with a helper, and would not be required to lift anything over five pounds. Claimant again stated that he would provide Knight with information about his past experience for assistance with resume development. Knight advised Claimant that she would send him new state and federal civil service applications for completion, as they had never received the other ones.

Knight made telephone contact with Claimant on January 28, 1999, who reported that he was working in his former position, which had been somewhat modified, but that he was not working with a helper. He was also not working any overtime. Claimant indicated to Knight that he would continue to maintain working for Employer as long as he is able to perform his job. Knight advised him that she would move his file into "follow-up employed" status, but would be available to assist with development of an alternate rehabilitation plan. (EX-7, pp. 1-5). Knight subsequently closed Claimant's file and requested that Claimant contact her if he was no longer working.

D. Report of Claimant's Functional Capacity Evaluation

James B. Schiro, LTR (Schiro), with LA Works, completed an FCE on Claimant on June 29 and 30, 1998, upon referral by Employer. The evaluation took a total of six hours, with Claimant demonstrating an excellent quality of effort and no symptom exaggeration. Claimant's functional abilities were found to be consistent with the sedentary

physical demand category with occasional lifting and carrying abilities in the ten to eighteen pound range, and indicated that Claimant was qualified to work full-time. Claimant was able to tolerate sitting, standing, walking and reaching on a frequent basis; squatting, kneeling, and climbing of stairs was tolerated on an occasional basis; repetitive bending and crawling were not tolerated. (EX-6). Specifically, the FCE indicated that Claimant could walk, stand and sit for 34% to 66% of the day, as well as climb, squat, and kneel for up to 33% of the day.

Claimant's trunk flexibility was limited to 65 degrees of lumbar sacral flexion and less than 10 degrees of lumbar sacral extension. Straight leg raises were limited to less than 45 degrees on the left side and less than 30 degrees on the right side. Lower extremity strength is generally 4+ of 5. With palpitation no obvious muscle imbalance or muscle spasm was observed. There was no evidence of symptom magnification and Claimant passed 90% of the administered validity criteria, suggesting maximal effort.

Based on Claimant's performance during his FCE, Schiro opined that Claimant's activities were consistent with the physical demands outlined above and those recommended by his treating physician. Based on Claimant's maximal effort, Schiro considered the FCE to be an accurate reflection of Claimant's current functional abilities.

E. Testimony of Employer and Vocational Rehabilitation Witness, Nancy T. Favalora

Favalora, was deposed on May 23, 2000, by Claimant's counsel, Arthur J. Brewster Esq., and Employer/Carrier's counsel, Wayne G. Zeringue, Jr., Esq., Favalora provided testimony as well at the hearing before me on the instant matter. Claimant met with Favalora, upon Employer's request, on October 23, 1998, to determine job possibilities for Claimant. (EX-5; EX-15). Favalora gathered personal background information on Claimant, as well as reviewing Claimant's work history, Functional Capacity Evaluation (FCE) performed by LA Works in June 1998, report on Claimant completed by Roberta Bell, PhD (Bell), and medical treatment history related to his workplace injury, as provided by Drs. Butler and Russo. Favalora completed a vocational analysis on Claimant, which indicated that Claimant had semi-skilled work experience and is able to return to work at that same level. Claimant's prior testing by Dr. Bell found him to have a full scale IQ of 110, placing him in the high average range. His grade equivalency in passage comprehension is at 16.9, indicating that Claimant is very capable of performing jobs requiring reading and writing tasks. In addition, Claimant is computer literate.

On December 14, 1998 Favalora conducted a job analysis for the First Class Hydraulic Operator position. Prior to completing said job analysis, Favalora contacted Boudreaux and McCann, providing both parties with a copy of Claimant's FCE to review, so they were able to determine if Claimant's already modified position as a first class hydraulic operator met Claimant's physical restrictions outlined in the FCE. (EX-16, p. 48). Favalora identified, with Boudreaux and McCann's assistance, the job tasks required by Claimant with regard to the modified first class hydraulic operator position, which were within said FCE restrictions. (EX-16, p. 28). Moreover, Favalora actually went out to the particular ship upon which Claimant would be working in preparation for this case. (EX-16, p. 24). Favalora discussed the job analysis she wrote with Claimant, and Claimant said that he could perform the job tasks noted on the job description. (EX-5, pp.6-8; Ex-15, pp. 12-15). The job tasks were as follows:

(1) operators usually carry tools that do not weigh more than five pounds all together;

(2) Claimant would climb onto the ship via a stairwell with handrails, as well as climb stairwells with handrails to get to various parts of the ship. Claimant would travel between decks and accomplish work tasks while at each location, with stair climbing not to exceed two and a half hours in an eight hour shift. Claimant would not have been required to climb vertical ladders;

(3) Claimant could sit on a padded five gallon bucket, which could be leaned against a wall if needed, or stand, to operate equipment, and while sitting he would use a lever to operate the anchor windlass or the deck winches;

(4) when components needed adjustments, Claimant was directed to let his helper pull on the wrenches, so that his helper could acquire those skills;

(5) when testing equipment, three to four people were to be used and Claimant was to record the data;

(6) Claimant was directed to walk aboard the ship, and was not usually required to crawl over objects, as long as Claimant was careful to watch where he walked due to cables and wires which are sometimes used on the deck;

(7) first class operators were directed to work 'smart,' which meant not lifting anything heavy; and,

(8) helpers and lower class mechanics were directed to do the heavier work, including bending and crawling.

The modified position for Employer, as documented by Favalora's December 14, 1998 job analysis, complied with the FCE form prepared on June 28, 1998 by Schiro. (EX-5, pp. 6-8). Favalora noted that Claimant's FCE was approved by Dr. Butler on July 19, 1998 and Dr. Butler approved Favalora's job description analysis on December 22, 1998. (EX-15, pp. 12-15).

In reviewing Claimant's sedentary to light modified first class hydraulic operator position with Favalora, McCann reported to Favalora that Claimant had been and would continue to be assigned a helper who would work directly for him, emphasizing that Claimant should allow his helper to complete tasks which included climbing from deck to deck and any work that exceeded his restrictions. (EX-15, pp. 35-41). McCann expressed to Favalora a willingness to have Claimant return to work part time and gradually build up to an eight hour workday. Furthermore, McCann stressed to Favalora that First Class Operators did not lift anything heavy and were instructed to use their helpers. Nonetheless, McCann also indicated to Favalora that Claimant did climb from deck to deck while working on prior occasions, but that this was not a required task.

Favalora next completed a labor market survey, identifying various full-time positions that she opined Claimant could perform using the skills and abilities he had acquired from past work, which she presented in a

February 28, 2000 report. (EX-5). Said positions were consistent with the restrictions of the FCE, and Dr. Butler had previously stated that Claimant could perform job tasks that are consistent with the restrictions of the FCE. The labor market survey identified appropriate employment opportunities outside of Claimant's past work at Employer, including:

(1) a real estate property appraiser for the state of Louisiana with earnings of $1,674 to $2,765 per month, which is a civil service position and can be applied for at anytime;

(2) a claims representative trainee with entry level wages at $27,800 annually. The worker may drive to different locations to give estimates to customers and would learn to take statements. There is a two to three week on the job training program for handling claims, and it is primarily a desk/office position, with lifting at ten to fifteen pounds and no overhead lifting;

(3) a dispatcher with starting wages exceeding $8.00 hourly and on the job training. The worker will be dispatching laborers to various job assignments, issue equipment and time sheets to employees, and it is a clerical/sedentary office position, with no real physical demands;

(4) a motor vehicle compliance I, which is a civil service position, with unidentified wages. The worker issues drivers licenses, license plates, identification cards, title registrations, evaluates documents, and works in an office setting;

(5) a tour desk agent with starting wages of $8.00 to $10.00 hourly. The worker will wear a headset and learn to work on a computer doing data entry and booking tours of the city of New Orleans, which is a sedentary position;

(6) a courtesy desk officer, which pays $8.00 hourly and requires the worker to control and monitor access to a building, while seated at a front desk and with no lifting; and,

(7) a registration operator, which pays $6.50 hourly and is a sedentary position. The worker will monitor alarms for businesses and residences and call appropriate services where necessary, learn to answer phone systems, and input information into a computer.

F. Testimony of Employer Witness, Deborah J. Hebert

Deborah Hebert (Hebert), Employer's worker's compensation adjuster who handled Claimant's claim, has been a worker's compensation specialist for Employer for six and a half years and has been an adjuster for over twenty five years. (Tr. 26-27). Hebert informed Claimant by letter of August 25, 1998 that "light duty" work was available within his restrictions for Employer in Claimant's department. (Tr. 28; CX-9). Hebert, in an attempt to get Claimant back to work, spoke to the first aid department, who in turn contacted Claimant's department, the

hydraulic department. (Tr. 28). Hebert did not know who first aid contacted in the hydraulic department.

Hebert testified that when Claimant returned to "light duty" in August 1998, he returned to the position of first class hydraulic operator, which had been modified based on the results of the FCE. (Tr. 29). At the time Claimant returned to work in August of 1998, the medical department issued a limited duty form which stated Claimant was restricted from lifting over twelve pounds and a maximum occasional carry of ten pounds. (Tr.30; CX-5, p. 10). Claimant continued in that position for a period of time without any difficulty.

Hebert testified that she received Dr. Butler's report in October of 1998, where Dr. Butler stated that on October 7, 1998 Claimant was progressively worsening and that it was unwise from a medical standpoint for Claimant to continue working under the conditions he was working. (Tr. 3l). After receiving this report, Hebert spoke with Jeff Boudreaux (Boudreaux), the superintendent of the hydraulic department, who informed Hebert that Claimant was working within his restrictions. (Tr. 31-32).

Furthermore, Hebert testified that she was aware that Dr. Butler and the FCE restricted Claimant to sedentary duty as of June 1998, and admitted that her August 25, 1998 letter to Claimant offering SAE used the term "light duty," and that the actual position offered to Claimant was sedentary, as far as being within the restrictions set forth by Dr. Butler and in the FCE completed on June 29 and 30, 1998. (Tr. 33-35).

Hebert confirmed that Claimant remained off of work from October 7, 1998 until the end of December, 1998. (Tr. 36-37). During that period of time, Hebert testified that she received reports from Knight, the vocational expert retained by the Department of Labor, as well Hebert consulted with Favalora, to compile a written job analysis analyzing the sedentary to light modified first class operator position that Claimant had previously been provided with by Employer. On December 14, 1998, Favalora completed the job description, for Claimant's modified first class hydraulic operator position, which position was within the restrictions set forth by Dr. Butler and in the FCE. (Tr. 38-50; CX-8, pp. 7-8).

G. Testimony of Employer Witness, Howard F. Doucet

Howard Doucet (Doucet), a second class mechanic, who had worked for Employer for about two and a half years at the time of the hearing before me, testified that he sometimes worked with Claimant and knew that Claimant's job duties for Employer were of a limited capacity. McCann directed Doucet to assist Claimant with whatever was needed. (Tr. pp. 273-83). Doucet testified that he helped Claimant with a crane test, just before Claimant stopped working for Employer, which job was assigned to them by McCann. Doucet testified that the crane operator was present for said testing, as well as himself, Claimant, another helper, and an electrician. (Tr. 279). Doucet testified that no other help was needed, and that he does not recall Claimant, or anyone, requesting additional help. Similarly, Doucet at no time heard Claimant complain to McCann that he was unable to perform the crane test. Doucet testified that Claimant climbed into the crane cab, accessed by a ladder, to take down data as it was called out. In Doucet's opinion, Claimant did not have to climb into the crane cab and could have taken the

data via radio or a sound system, from the deck of the ship, thirty feet below the crane cab. (Tr. 281-82). Radios were generally accessible as needed, and with very little effort operators could generally get what they needed. (Tr. 275-76).

Doucet testified that he never heard anyone at Employer's work instruct Claimant to work beyond his restrictions, lift anything heavy, or do extended climbing, kneeling, or anything of that nature. (Tr. 282-85). In fact, Claimant often mentioned that he was not supposed to do particular tasks, thus Doucet would offer to perform such tasks, and Claimant would then often do such tasks anyway. In fact, Doucet testified that Claimant mentioned climbing a ladder for the crane test would not be easy, but Claimant climbed the ladder to the crane cab anyway because Claimant felt that he should be there to take the readings.

H. Testimony of Employer Witness, Steven R. McCann

McCann, Claimant's supervisor, was the ship operator foreman for Employer. McCann testified that he did not see the FCE but had reviewed some documents, provided by Claimant upon his return on August 25, 1998, one from Claimant's doctor, indicating that Claimant had certain restrictions on him, including no lifting of more than five pounds and no extended stair climbing or extended walking. (Tr. 311-14). McCann specifically instructed Claimant to work only within his restrictions[5]. (Tr. 316-19, 368-69, 374-75).

McCann testified that he only modified Claimant's job on one occasion, when he first came back to work after the accident, which modification was to perform limited duty in McCann's department, to supervise and educate lesser qualified mechanics and helpers. (Tr. 315, 349-50). McCann testified that he instructed Claimant that his new job was to supervise and run the job, and he was not supposed to work outside of his physical profile. (Tr. 316). McCann testified that he never assigned Claimant a job that was beyond his restrictions. (Tr. 318). It was McCann's intent that Claimant would not have carry any tools, turn any wrenches, open valves, or do any physical work. (Tr. 318-19). In fact, he specifically never assigned Claimant to a space where he had to crawl, crouch, or climb, and never assigned Claimant to run up and down gangways and ramps all day, in excess of his walking and climbing restrictions. Furthermore, Claimant never complained to McCann that he was assigned a job that was beyond his physical restrictions or limitations, and if he had complained of such, McCann would have accommodated Claimant or cancelled the job and assigned it to someone else at a different date. (Tr. 320-21).

Concerning the crane test which was completed just before Claimant left Employer for the last time in June 1999, McCann testified that Claimant had been assigned the people needed to assist him and take whatever readings were necessary, and all Claimant had to do was interface with the customer or regulatory bodies, informing them of

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5 Although McCann testified that he did not remember seeing Claimant's FCE, it is obvious by his accurate and detailed description of the FCE contents, that he was mistaken about whether he saw the FCE.

what procedures would be done next. (Tr. 320-23). Claimant could have stood on the weather deck and looked up at the crane while everybody else was operating it and taking the readings. He did not have to physically climb a ladder or lift anything. Furthermore, a third class mechanic is equally qualified, or sometimes more qualified, to have conducted such tests. Claimant could have gotten in touch with McCann at any time via the radios that are provided for doing the testing or McCann's beeper, and at no time contacted McCann requesting more help. (Tr. 325-26).

I. Testimony of Dr. Butler

Dr. Butler, an orthopedic specialist and Claimant's treating physician, first treated Claimant on June 18, 1997 with complaints of back pain that radiated to the left buttock and thigh. Claimant's symptoms worsened with activity, and he had numbness in the medial aspect of his right buttock. Physical examination showed that Claimant could stand erect, but was unable to hyperextend his back because of complaints of low back pain. All movements were limited by subjectively worsening low back pain. He also had a positive straight leg raising test on the right side, suggesting some irritation of the lumbar nerves on that affected side. (CX-2, pp. 5-7; CX-4, pp. 26-27). X-rays were performed at that time, indicating some postsurgical changes at the L4-5 level consistent with his previous surgery. Dr. Butler opined that Claimant had some component radiculopathy and sustained a lumbar strain. Dr. Butler recommended physical therapy and/or having a lumbar MRI completed.

Claimant next saw Dr. Butler on June 25, 1997, with complaints of back and right leg pain with numbness. (EX-4, p. 25). The MRI was subsequently approved and completed on July 2, 1997 at Slidell Memorial, which Dr. Butler reviewed on July 8, 1997, and found indicated mild to moderate stenosis or spinal stenosis at the L3-4 level. (CX-2, pp. 8-9; CX-4; EX-4, p. 24). Claimant presented with similar pain complaints upon his July 8, 1997 examination by Dr. Butler, who recommended physical therapy, three times a week for two weeks, and released Claimant to sedentary work. Claimant received physical therapy at Slidell Memorial from July 17, 1997 to August 14, 1997. Claimant next saw Dr. Butler on July 29, 1997, and reported to Dr. Butler that the physical therapist recommended continuing therapy, which Br. Butler ordered, as well as suggesting that Claimant undergo a functional capacity evaluation (FCE). (CX-2, pp. 9-10; EX-4, p. 23). Dr. Butler released Claimant to sedentary to light duty work, requesting that Claimant return to see him in one month.

Claimant returned to Dr. Butler's office on August 19, 1997, and his back and leg symptoms had completely resolved. Upon that visit, Claimant had been released from physical therapy and Dr. Butler released him to full duty work effective August 25, 1997, with continued home lumbar exercises and return visits as needed. (EX-4, p. 22). Although Claimant was released to full duty by Dr. Butler and returned to his prior position as a first class hydraulic operator for Employer, Claimant was instructed by his supervisor not to lift anything heavy. (Tr. pp. 106-07).

Claimant returned to see Dr. Butler on February 3, 1998, with complaints of reoccurring symptoms, which had reportedly never completely resolved. (EX-4, p. 21; CX-2 pp. 11-12, 55). Claimant denied further trauma, but reported that he had been doing a lot of walking, climbing, lifting, and carrying on the job. Examination revealed

subjective tenderness in the lower back at the L4-5 level. Paraspinous muscles were tender in that area but no muscle spasm was detectable. Claimant's range of motion was limited and all movements caused him to have subjectively worsening low back pain. Dr. Butler advised that Claimant not work at that time and undergo exercises with prescription medication for relief. Claimant reported to Dr. Butler that he preferred home exercises and would carry such orders out.

Claimant returned to see Dr. Butler on February 17, 1998, with complaints of moderate back and leg pain. Dr. Butler prescribed physical therapy to the lumbar spine, three times a week for two weeks, and kept Claimant off work. (EX-4, pp. 19-20; CX-2 p. 13). Claimant returned on March 4, 1998, reporting that he did some exercises, which increased his back and leg pain. Dr. Butler recommended a lumbar steroid injection, continued Claimant's medication, and recommended that Claimant was capable of sedentary work. Claimant returned on March 31, 1998, complaining that the steroid injection has increased his pain. (EX-4, p.18; CX-2 pp. 14-15). Dr. Butler recommended a second injection and possible lumbar myelogram and CT scan of the lumbar spine, and continued Claimant's medications for pain relief. Dr. Butler felt that Claimant was capable of sedentary work, with no lifting or carrying heavy objects, no unusual bending, and alternate sitting and standing.

Claimant returned to see Dr. Butler on April 14, 1998, with marked improvement of his back pain since he stopped exercising and walking. Although, Claimant reported that his last steroid injection, performed March 27, 1998, provided him no relief. (EX-4, pp. 16-17; CX-2 pp. 15-17). Dr. Butler continued to restrict Claimant to sedentary work, with limited standing and walking.

Dr. Butler saw Claimant on May 12,1998, with similar complaints that had slightly improved since the last examination. Dr. Butler found Claimant to be at maximum medical improvement (MMI) for conservative treatment upon that May 12, 1998 visit. At that time, Dr. Butler also recommended an FCE, which was completed on June 29 and 30, 1998. Dr. Butler reviewed the FCE in an August 14, 1998 letter to Employer, and considered the FCE to be an accurate representation of Claimant's then current functional abilities, which placed him in the sedentary to light physical demand category with limitations exactly as set forth in the FCE, including climbing. (EX-4, p.13; CX-2, pp. 20, 43, 60).

Claimant saw Dr. Butler again on June 23, 1998, with similar complaints and findings. (EX-4, p. 15; CX-2 p.18). Claimant saw Dr. Butler again on July 15, 1998, with similar complaints and findings, but Claimant asserted that he may ultimately want surgery. (EX-4, p.14; CX-2 pp. 18-19). Claimant also reported to Dr. Butler that he wanted to return to work, but had a problem sitting for forty-five minutes, the length of time it took to get from home to work for Employer.

Claimant received a letter dated August 25, 1998 from Hebert, with Employer, offering what was called a light duty position, but nevertheless fit the limitations set forth by the FCE and Dr. Butler. In response, he returned to work on August 31, 1998 and worked until October 7, 1998. (CX-9, p.1).

On September 7, 1998, Claimant saw Dr. Butler, with slightly increased pain in his low back due to the fact that he exceeded the restrictions set forth in the FCE and by Dr. Butler. Dr. Butler prescribed Ultram for pain. (EX-

4, pp. 10-12; CX-2 pp. 20-23). Claimant saw Dr. Butler again on October 7, 1998, with increasing symptoms due to the amount of hours worked and physical exertion on the job. Dr. Butler subsequently restricted Claimant from working in a capacity that exceeded Claimant's physical abilities compatible with the FCE, as Claimant had been exceeding the restrictions set forth by Dr. Butler and the FCE, and notified Hebert of such in a letter date October 7, 1998. Dr. Butler further opined in said letter that Claimant may require surgery in the future if he continued to exceed said restrictions. Claimant returned to see Dr. Butler on November 18, 1998 with slightly improved complaints and findings. Claimant was not taking pain medication and was doing well, as long as he limited his activities. (EX-4, p. 9; CX-2 p.24).

Dr. Butler again examined Claimant on January 6, 1999, and at that time Claimant had returned to work on a modified duty basis, with consistent complaints of pain, that were, however, tolerable. Dr. Butler noted upon that visit that he was concerned about Claimant doing excessive overtime. (EX-4, p. 6-7; CX-2 pp. 24-26). Dr. Butler examined Claimant again on March 3, 1999, who presented with consistent low back pain and leg complaints. X-rays were taken and indicated no advancement of the degenerative changes previously noted. Claimant next saw Dr. Butler on May 3, 1999 with increased complaints of back pain from working longer hours.

Dr. Butler again examined Claimant on June 8, 1999, who presented with increasing back and leg pain, reportedly due to excessive climbing at work. (CX-2, pp. 26-33). Claimant mentioned upon that visit that he was considering proceeding with surgery. Dr. Butler advised Claimant to continue working in a sedentary capacity and return for follow-up in six weeks. Concerning Claimant's modified position for Employer, Dr. Butler opined that a person generally limited to sedentary activities should be restricted from climbing ladders. Also, the frequent or repetitive climbing of stairs or ramps, in excess of Claimant's restrictions concerning climbing stairs or ramps, would likely increase his symptoms, as would crawling or getting into unusual positions. Although, Dr. Butler believed that the climbing Claimant was required to do was within his FCE restrictions as long as the climbing aboard the vessel was at an equal or lesser angle than climbing ordinary household stairs, Claimant could perform such climbing aboard the vessel. (EX-14, pp. 53, 59-61). In addition, Dr. Butler advised that Claimant be able to sit in something with some sort of backing available or sit where he could prop his back up against something. (CX-2, p.50). Dr. Butler examined Claimant again on July 7, 1999, who presented with consistent, but somewhat improved complaints. Claimant reported that he was still considering surgery. Dr. Butler continued medications for pain relief.

Dr. Butler examined Claimant again on August 25, 1999, who presented with consistent, but somewhat improved complaints, as he had been less active. Upon that visit, Dr. Butler noted that Employer was unable to accommodate Claimant with a job within his limitations. Dr. Butler examined Claimant again on October 27, 1999, who presented with consistent, but somewhat increased pain complaints. Claimant again reported that he was still considering surgery. Dr. Butler continued medications for pain relief and opined that Claimant was capable of working a modified position. (EX-14, pp. 31-35). Dr. Butler examined Claimant again on January 21, 2000, who presented with an exacerbation of his symptoms without any additional trauma. Claimant reported that he was still considering surgery. Dr. Butler continued medications for pain relief.

In short, Dr. Butler opined that Claimant sustained a new structural problem, as a result of his June 13, 1997 workplace accident, at the level right above where he had previous surgery. He had some pre-existing structural

problems with his back, in that the cross-sectional area of his spinal canal is smaller than normal, which predisposed him to the spinal stenosis that became symptomatic upon Claimant's June 13, 1997 workplace accident. (CX-2, p. 36).

J. Records of Dr. Russo and Ochsner Clinic

Dr. Lawrence J. Russo, an orthopedist, examined Claimant on one occasion, August 7, 1997, due to pain in the lumbar spine, which eventually radiated into Claimant's right thigh and right hip area, as well as the right calf. (EX-3). Dr. Russo recounted the medical treatment Claimant received subsequent to his June 13, 1997, workplace accident and prior to Claimant's August 7, 1997, examination by Dr. Russo, and reviewed his medical findings concerning Claimant in a letter dated August 8, 1997 to Hebert.

Upon that visit to Dr. Russo, Claimant reported decreased back pain, which was made worse by certain activities, such as driving. Claimant said he could minimize said pain by stopping driving about every thirty minutes and taking a walk. Claimant reported that his leg pain had resolved, he was sleeping better, and exercising.

Dr. Russo examined Claimant finding him to have a mild restriction in the range of motion in his lumbar spine. Claimant had no muscle spasm and no tenderness to the muscles. He had a normal neurological examination of the lower extremities. Straight leg raising was negative on the left but caused some slight pulling in the right leg, which did not cause Claimant pain. X-ray examination of Claimant's lumbar spine indicated that he has five true lumbar vertebra, with some degenerative changes in the area where Claimant previously underwent a lumbar laminectomy. Dr. Russo diagnosed Claimant with a lumbar sprain supreimposed upon a previous lumbar laminectomy, and recommended that Claimant follow through with Dr. Butler's recommendation for another couple of weeks of therapy, when Dr. Butler would re-evaluate Claimant, possibly sending him back to work at that time.

K. Records of Slidell Memorial Hospital

Pursuant to Dr. Butler's July 8, 1997 examination of Claimant and orders for physical therapy, three times a week for two weeks, Claimant received said physical therapy at Slidell Memorial from July 17, 1997 to August 14, 1997. (CX-2, pp. 8-9; CX-4; EX-4, p. 24). Claimant's treatment plan for physical therapy included the following: (1) modalities as needed for pain control; (2) work simulation activities; (3) education and training regarding lifting techniques; and, (4) strengthening exercises for Claimant's low back and bilateral lower extremities. (CX-2, pp. 18, 20-21). Claimant was discharged from physical therapy on August 18, 1997, having completed his treatment plan and accomplished his goal of returning to work with tolerable low back pain.

Claimant received physical therapy at Slidell Memorial again from February 18, 1998 to February 27, 1998, pursuant to Dr. Butler's February 17, 1998 examination of Claimant and orders for physical therapy to the lumbar

spine, three times a week for two weeks. (EX-4, pp. 19-20; CX-2 p.13). Claimant's treatment plan for physical therapy included the following: (1) moist heat; (2) inferential electrical stimulation; (3) manual therapy for McKenzie techniques; and, (4) lumbar traction. (CX-2, pp. 10). Claimant's long term goals established were as follows: (1) independent with home exercise program; (2) lumbar range of motion 90% of within normal limits; (3) decrease pain by 75%; (4) return patient to full duty status; and, (5) decrease tightness at quadriceps and hip flexors with independent home program to follow of stretching. Claimant was discharged from physical therapy on May 6, 1998, having accomplished goals 1, but not two-five, as Claimant had to go out of town due to his mother's illness.

IV. DISCUSSION

A. Contentions of the Parties

Claimant asserted that: (1) he is temporarily and totally disabled as a result of his June 22, 1997 workplace accident; (2) the job offered by Employer to Claimant on October 8, 1998, exceeded his restrictions and did not constitute SAE; and, (3) Employer did not offer SAE through the modified job with Employer, as described by Favalora, as well as the labor market survey completed by Favalora, as the labor market survey did not take into consideration all of Claimant's physical limitations due to his workplace accident.

Employer asserted that: (1) Employer offered SAE through the labor market survey completed by Favalora; (2) the modified position that they provided to Claimant fell within Claimant's physical restrictions, as set forth by Dr. Butler and the FCE, and thereby constituted SAE; and (3) Claimant voluntarily chose to work outside the scope of his job description, beyond his restrictions established by his FCE and Dr. Butler, and contrary to the direct orders of his supervisor.

B. Prima Facie Case, Causation, Nature and Extent of Disability, and Suitable Alternative Employment

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); Todd Shipyards Corporation v. Donovan, 300 F.2d 741 (5th

Cir. 1962); Atlantic Marine, Inc., and Hartford Accident & Indemnity Co., v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). The United States Supreme Court has determined, however, that the "true doubt" rule, which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (d), and that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S. Ct. 2251 (1994), *aff'g* 990 F.2d 730 (3rd Cir. 1993); Director, OWCP v. Maher Terminals, Inc., 114 S. Ct. 2251 (1994).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kier v. Behlehem Steel Corp., 16 BRBS 128 (1984); Kelaita, *supra*. Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. Parsons Corp. of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980); Butler v. District Parking Management Co., 363 F.2d 682 (D.C. Cir. 1966); Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989); Kier, *supra*. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. Brown v. Pacific Dry Dock, 22 BRBS 284 (1989); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1981); Holmes v. Universal Maritime Serv. Corp., 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. Sprague v. Director, OWCP, 688 F.2d 862 (1st Cir. 1982); Holmes, *supra*; MacDonald v. Trailer Marine Transport Corp., 18 BRBS 259 (1986).

In this case, the parties have stipulated that an accident occurred in the course and scope of Claimant's employment on June 13, 1997, and that Claimant suffered a work related injury because of said accident. Consequently, I find that Claimant is entitled to rely on the presumption supplied by Section 20(a) of the Act. However, this presumption does not establish entitlement to either compensation or benefits under the Act until Claimant establishes the nature and extent of his disability.

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either nature (permanent or temporary) or extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968); Seidel v. General Dynamics Corp., 22 BRBS 403, 407 (1989);

Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that the claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 91 (1989); Care v. Washington Metro. Area Transit Authority, 21 BRBS 248 (1988).

An employee is considered permanently disabled if he has any residual disability after reaching MMI. Lozada v. General Dynamics Corp., 903 F.2d 168, 23 BRBS (CRT) (2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148 (1989); Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56(1985). A condition is permanent if Claimant is no longer undergoing treatment with a view toward improving his condition, Leech v. Service Engineering Co., 15 BRBS 18(1982), or if his condition has stabilized. Lusby v. Washington Metropolitan Area Transit Authority, 13 BRBS 446(1981). If the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that MMI has been reached. Dixon v. John J. McMullen & Assoc., 19 BRBS 243, 245(1986); Mills v. Marine Repair Serv., 21 BRBS 115, 117 (1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986); White v. Exxon Co., 9 BRBS 138, 142 (1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1980).

I find that, in the instant case, Claimant reached MMI by May 12,1998, as specifically determined by his treating physician, Dr. Butler. Although Claimant's MMI date was not stipulated to by the parties in this matter, it was not presented as an issue, thus I accept the opinion of Dr. Butler in the absence of further presentation.

Furthermore, the Act does not provide standards to distinguish between classifications and degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, Claimant must establish that he can no longer perform his former longshore job due to his job-related injury. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); P&M Crane Co. v. Hayes, 930 F.2d 424, 429-30 (5th Cir. 1991); SGS Control Serv. v. Director, Office of Worker's Comp. Programs, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. Elliot v. C&P Telephone Co., 16 BRBS 89(1984). The same standard applies whether the claim is for temporary or permanent total disability. If the claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171(1986).

Claimant established his prima facie case of total disability through Dr. Butler's medical testimony and the restrictions placed on Claimant by the FCE limiting him to a less strenuous position than his previous job. (EX-6; CX-2). Thus, in the instant case, I have relied on Dr. Butler's position that Claimant sustained a new structural problem, as a result of his June 13, 1997 workplace accident, at the level right above where Claimant previously had a lumbar laminectomy, and restrictions were placed upon Claimant limiting his work due to said aggravation. (CX-2, p. 36). Thus, shifting the burden to Employer to prove that they provided Claimant with SAE.

Once the case of total disability is established, the burden shifts to the employer to establish the availability of SAE. Turner, 661 F.2d at 1038; P&M Crane, 930 F.2d at 430; Clophus v. Amoco Prod. Co., 21 BRBS 261(1988). Total disability becomes partial on the earliest date on which the employer establishes SAE. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1(CRT)(D.C. Cir. 1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991). An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. An employer can meet its burden by offering the injured employee a light duty position at its facility, as long as the position does not constitute sheltered employment. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224(1986). If the employer **does** offer suitable work, the judge need not examine employment opportunities on the open market. Conover v. Sun Shipbuilding & Dry Dock Co., 11 BRBS 676, 679 (1979). If employer **does not** offer suitable work at its facility, the Fifth Circuit in Turner, established a two-pronged test by which employers can satisfy their alternative employment burden:

> (1) Considering claimant's age, background, etc., what can claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.
>
> 661 F.2d at 1042; P&M Crane, 930 F.2d at 430.

If the employer meets its burden by establishing SAE, the burden shifts to the claimant to prove reasonable diligence in attempting to secure some type of SAE shown within the compass of opportunities, by the employer, to be reasonably attainable and available. Turner, 661 F.2d at 1043. Termed simply, the claimant must prove a diligent search and the willingness to work. Williams v. Halter Marine Serv., 19 BRBS 248 (1987). Moreover, if the claimant demonstrates that he diligently tried and was unable to obtain a job identified by the employer, he may prevail. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). If the claimant fails to satisfy this "complementary burden," there cannot be a finding of total and permanent disability under the Act. Turner, 661 F.2d at 1043; Southern v. Farmers Export Co., 17 BRBS 64 (1985).

In this case, Claimant established his *prima facie* case of temporary total disability from the date of his injury through August 25, 1997, when Employer offered Claimant a modified position of SAE in Employer's hydraulics department, which was within the restrictions established by Dr. Butler. The modified position offered by Employer did not constitute sheltered employment in that it was necessary and

productive work. Darden v. Newport News Shipbuilding & Drydock Co., 18 BRBS 224, 226 (1986).

Moreover, an employer offered position does not constitute SAE if is found to be too physically demanding for Claimant to perform. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); Mason v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is this position which is relied upon by Claimant in this matter. However, I do not credit Claimant's testimony in this regard since it is not established by the record, medical evidence, nor the testimony provided in the instant matter.

Claimant argued that the work offered to him by Employer after his accident exceeded the sedentary restrictions imposed on him by Dr. Butler and the FCE, entitling him to compensation. Claimant argued that Hebert offered him light duty, not sedentary duty. However, Hebert testified that she was aware that Dr. Butler and the FCE restricted Claimant to sedentary duty, concerning certain workplace activities, as of June 1998, and admitted that her August 25, 1998 letter to Claimant offering SAE used the term "light duty," but that the actual position offered to Claimant was sedentary, as far as being within the restrictions set forth by Dr. Butler and in the FCE completed on June 29 and 30, 1998. (Tr. 33-35).

Furthermore, Hebert reviewed reports from Knight, the vocational expert retained by the Department of Labor, as well as consulting with Favalora, to compile a written job analysis analyzing the sedentary to light modified first class operator position that Claimant had previously been provided with by Employer. On December 14, 1998, Favalora completed the job description, for Claimant's modified first class hydraulic operator position, which position was within the restrictions set forth by Dr. Butler and in the FCE. (Tr. 38-50; CX-8, pp. 7-8).

Claimant also argued that McCann never saw the FCE or any reports of Dr. Butler, nor did McCann know what sedentary meant. However, McCann testified that he had reviewed some documents, provided by Claimant upon his return, one from Claimant's doctor, indicating that Claimant had certain restrictions on him, including no lifting of more than five pounds and no extended stair climbing or extended walking. (Tr. 311-14). McCann specifically instructed Claimant to work only within his restrictions, and not to do physical work. (Tr. 316-19, 374-75).

McCann testified that he instructed Claimant that his new job was to supervise and run the job, and he was not supposed to work outside of his physical profile. (Tr. 315-16). McCann never assigned Claimant a job that was beyond his restrictions. (Tr. 318). McCann further testified it was his intent that Claimant would not have carry any tools, turn any wrenches, open valves, or do any physical work. (Tr. 318-19). McCann never assigned Claimant to a space where he had to crawl, crouch, or climb, and never assigned Claimant to run up and down gangways and ramps all day in excess of his walking and climbing restrictions. Furthermore, Claimant never complained to McCann that he was assigned a job that was beyond his physical restrictions or limitations, and if he had complained of such, McCann would have accommodated Claimant or cancelled the job and assigned it to someone else at a different date. (Tr. 320-

21).

In fact, Claimant initially disputed the fact that modifications were made to his first class operator position with Employer, and later admitted that modifications were, in fact, made. (Tr. 106-16). Claimant emphasized McCann's testimony that he only modified Claimant's job on one occasion, when Claimant first returned to work after his workplace accident, which modification was to perform limited duty in McCann's department, to supervise and educate lesser qualified mechanics and helpers. (Tr. 315, 349-50). Claimant's job was appropriately limited within the restrictions set forth by Dr. Butler from the time when Claimant first returned to work after his workplace accident and continuing. Claimant's job, upon returning from his workplace accident, was to supervise and do *no* physical work. The FCE and Favalora's job description further documented and emphasized the appropriate nature of Claimant's modified first class hydraulic operator position from Claimant's first return to work in August 1997, following Claimant's workplace accident, and continuing.

Claimant further argued that Dr. Butler's expert opinion established that the work for Employer exceeded his restrictions. However, again I find this statement unsupported by the record, which in fact indicates that Dr. Butler agreed with the limitations set forth in the FCE and approved the modified position identified by Employer in Claimant's former department as falling within Claimant's restrictions as identified in the FCE and by himself. (EX-4, p. 13; CX-9). Dr. Butler did restrict Claimant from working in a capacity that exceeded Claimant's physical abilities compatible with the FCE, because Claimant had been voluntarily exceeding the restrictions set forth by Dr. Butler and the FCE, as indicated by the record. Indicative of this, shortly before Claimant quit working for the final time in June 1999, he saw Dr. Butler on May, 3, 1999 complaining of an increase in back pain due to working longer hours. (CX-2, p. 26). Dr. Butler felt this was an exacerbation of his prior problems. As specified below, Claimant's voluntarily exceeded his scheduled work hours, which were within the restrictions set forth by Dr. Butler, the FCE, and Favalora's job description. Thus, any exacerbation of prior problems was due to Claimant's voluntary actions.

Claimant knew what his restrictions were and knew that he was not requested to work outside of them. Claimant's supervisor, McCann, specifically instructed Claimant to work only within his restrictions. (Tr. pp. 316-19, 374-75). Despite the restrictions placed on Claimant, and contrary to McCann's direct instructions, Claimant voluntarily worked outside of his restrictions, including voluntarily working numerous overtime hours. (Tr. pp. 257-58). Claimant testified that Employer did not require him to work overtime after returning to work in a modified position, but he chose to work overtime. (Tr. p. 238). Claimant understood the restrictions placed on him pursuant to his FCE, as approved by Dr. Butler, yet he chose to work beyond those restrictions. (Tr. 203-04).

Still, Claimant testified that just prior to his June 1999 departure from employment, he was required to perform a crane test that exceeded his restrictions because he had no help. (Tr. 136-39). Contrary to Claimant's testimony, Doucette and McCann's testimony established that Claimant was not required to perform the crane test alone, Claimant did not request assistance if any was needed, and Claimant

unnecessarily chose to do parts of the test himself. (Tr. 279, 322-23).

Relying on the reports and testimony of Dr. Butler, as well as the FCE performed on Claimant, and the modified position provided by Employer, I find that Claimant was able to perform the sedentary to light duty work offered to him by Employer. Claimant voluntarily exceeded the restrictions set forth by Dr. Butler and the FCE, as implemented into a modified position of work as a First Class Hydraulic Operator. I credit the testimony of McCann and Hebert that Claimant was told to work within his physical restrictions as established by Dr. Butler and the FCE.

Although Claimant argued that his physical limitations would have caused him difficulty in performing his duties for Employer as a modified First Class Hydraulic Operator, I find that the assigned work was well within his physical limitations and the modified sedentary to light duty first class operator position constituted SAE. Claimant exceeded his restrictions in the face of specific directions not to do so, to his own physical detriment. Claimant suffered no economic loss due to his June 13, 1997 workplace injury, and Employer's offer of SAE relieves it of any duty to pay compensation under the Act.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and the record in its entirety, I enter the following Order:

Claimant Philip Parent's claim for benefits under the Act is **DENIED.**

ORDERED this 1ST day of SEPTEMBER, 2000, at Metairie, Louisiana.

CLEMENT J. KENNINGTON
Administrative Law Judge